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MARGINAL RELEASE OF TRUST DEEDS.

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Until a comparatively recent date the only method of releasing a mortgage or trust deed in Virginia was by a solemn deed of release, executed and delivered for record by the trustee. Owing to the trifling expense and occasional inconvenience of this old procedure the legislature, by an act approved March 18, 1884 (Acts 1883-'4, p. 708), undertook to correct the supposed evil, by providing an easy and expeditious mode of removing such encumbrances. That act reads in part as follows:

> "Be it enacted by the general assembly of Virginia, That any person entitled to the benefit of any lien on any estate, real or personal, or to the money secured thereby, whether the lien was created by conveyance, judgment, decree, lis pendens, notice of attachment, or otherwise, may release such lien by a writing signed by him, and acknowledged before a clerk of the court in which the lien is docketed, or other person authorized to take acknowledgments of deeds, and admitted to record in the proper county. Such writing shall be known as a release, and shall be deemed sufficient, if it describes the lien to be released by any words that will identify and show an intent to discharge the same. * * *
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> "When the release has been so signed and acknowledged, it may be presented for record to the clerk, in whose office the lien thereby intended to be released is recorded or docketed; and from and after the time the same is so left for record —which time the clerk shall endorse thereon—the said lien shall be discharged and extinguished, and the estate, of whatever kind, bound or affected thereby, shall be deemed to be vested in the former owner, or those claiming under him, if such lien had ever existed." (Probably meant to be, "as if such lien had never existed.")

It will be observed that this initial act made the use of such marginal release optional with the lien-holder, who might still give a formal release deed if desired.

By an act approved November 22, 1884 (Acts 1884, p. 83), the former act was amended so as to read as follows:

> "In all cases where payment or satisfaction shall be made, which does not appear by the return of an execution to the office of the clerk where the judgment is docketed, and is not hereinbefore provided for, or when the payment or satisfaction shall be made in whole or in part of a debt secured by deed of trust or vendor's lien, it shall be the duty of the judgment or lien-creditor, either by himself, his agent, or attorney, to cause such payment or satisfaction, whether in whole or in part, to be entered on said judgment docket, or on the margin of the page in the book where such incumbrance is recorded, within ninety days after the same is made, and for any failure to do so, such judgment or lien-creditor shall be liable to a fine of twenty dollars. Such entry of satisfaction or payment shall be signed by the creditor, his duly authorized agent or attorney, and when so signed, and the signature thereto attested by the clerk in whose office the lien is recorded, the same shall operate as a release of the judgment, deed of trust, or other lien as to which such satisfaction or judgment is so entered."

The noticeable changes here made are, first, that the lienholder is bound, under penalty of $20.00, to make the marginal release within 90 days from date of payment; and, second, that this was obligatory whether such payment was "in whole or in part" of the debt secured.

The next change occurs in the Code of 1887, where the statute in question, further amended, appears as section 2498, which reads:

> "When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendor's or mechanic's lien, it shall be the duty of such lien creditor to cause such payment or satisfaction, within ninety days after it is made, to be entered on the margin of the page in the book where such encumbrance is recorded, and for any failure to do so, he shall forfeit twenty dollars. Such entry of payment or satisfaction shall be signed by the creditor, his duly authorized agent or attorney, and when so signed and the signature thereto attested by the clerk in whose office such encumbrance is recorded, the same shall operate as a release of the encumbrance as to which such payment or satisfaction is entered. Any person who owns or has an interest in real

> estate, on which such encumbrance exists, may, after ten days' notice thereof to the person entitled to such encumbrance, apply to the county or corporation court of the county or corporation, in whose clerk's office such encumbrance is recorded, or to the chancery court of the city of Richmond, if it be recorded in the Clerk's office of said court, to have the same released or discharged; and upon proof that it has been paid or discharged, such court shall order the same to be entered by its clerk on the margin of the page in the book wherein the encumbrance is recorded, which entry when so made shall operate as a release of such encumbrance."

Here, it will be seen, the Revisors omitted the partial release clause, but continued in force the provision making imperative the lien creditor's duty to enter such marginal release within a specified time after "satisfaction."

It was under the latter part of this section 2498 that the first reported case arose, in which its construction was involved. That case, though not particularly pertinent to our present enquiry, may be noticed very briefly. It is *Turnbull* v. *Mann,* 94 Va. 182, where one, John Mann, made application to have released and discharged an old deed of trust upon his property, relying, as he did, for such relief on the presumption of payment from long lapse of time, since there was no affirmative proof that the debt had been satisfied. The lower court ordered said deed to be marked off the record. The Court of Appeals, however, reversing such judgment, held that this statute was never intended to give a summary remedy for having liens marked "satisfied" merely because they are stale, or liable to be barred, but only when it is satisfactorily shown that the *debt secured has been actually paid or discharged.*

Said section 2498 next came under review in the case of *Evans* v. *Bank,* 95 Va. 294, which presented a very interesting situation. The facts immediately in point were as follows: Lizzie Reed being the owner of a certain lot in Roanoke, which she had acquired from one C. A. Myers, under date of October 25, 1892, gave a trust deed on same to J. H. Hartwell, trustee, to secure said C. A. Myers the sum of $1200.00, evidenced by three negotiable notes, each for the sum of $400.00, made pay-

able to said Myers, at 6, 12, and 18 months after date, respectively. On December 29, 1892, C. A. Myers endorsed said notes and had them discounted at the Roanoke Savings Bank, which took same solely on the security furnished by the deed of trust to Hartwell, trustee. On June 2, 1893, C. A. Myers went to the Clerk's office and had entered on the margin of the deed book where said trust deed was recorded a memorandum stating that the debt, secured by said Hartwell deed had been paid in full, and that the lien thereby created was released as to a certain part of the property; which memorandum the said C. A. Myers signed and acknowledged before the Clerk. By deed dated May 9, 1893 (A. R. June 26, 1893), Lizzie Reed conveyed said land to W. P. Washburn, trustee, to secure a debt due to the Covenant B. & L. Ass'n, of Knoxville, Tenn., on account of a loan which could only be obtained after the marginal release of said Hartwell deed had been entered as aforesaid. By deed dated August 10, 1893, Lizzie Reed conveyed part of said land to Evans Bros., which deed went to record in due course. On September 16, 1893, C. A. Myers made another marginal release of the Hartwell lien as to the part so purchased by Evans. Some time later, default having been made in payment of the notes held by the Roanoke Savings Bank, the trustee was requested by said Bank to foreclose said Hartwell deed, which he proceeded to do. Then, for the first time, a question was raised as to the validity of said Hartwell lien which had been so released, and the Bank filed its bill against Evans and others alleging that it was a *bona fide* holder for value of said notes, and that it had no knowledge of the releases above mentioned, which the plaintiff charged to have been fraudulently entered by a party who had no right to make them, and that plaintiff was entitled to priority over those claiming under any subsequent deed.

The Hustings Court of Roanoke sustained plaintiff's claim *in toto*, and accordingly gave preference to said Bank as holder of the notes which it had so taken by assignment from C. A. Myers. Our Court of Appeals, reversing in part the decree of the lower Court, said:

"When C. A. Myers entered satisfaction of the deed of trust to secure the $400 notes, of which, so far as disclosed by the record, she (C. A. Myers) was the owner, it operated as a release of that encumbrance," and that "the decree of the Corporation Court of Roanoke is erroneous in so far as it postpones the lien of the Covenant B. & L. Association to that of the Roanoke Savings Bank."

In other words, as stated by the Reporter in his syllabus:

"The beneficiary under a second deed of trust has priority over the *bona fide* holder of negotiable notes secured by the first deed, where it appears that the original beneficiary under the first deed, after transferring those notes, fraudulently marked the lien satisfied on the margin before the execution of the second deed, the beneficiary in the second deed having had no notice that the notes secured by the first deed had been transferred or were still unpaid, or of any fraud in the transaction."

In 1894 the statute in question was amended so as to read as follows (Acts 1893-'4, p. 483):

"When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendor's or mechanic's lien, it shall be the duty of such lien creditor, unless he shall have heretofore delivered a proper release deed, to cause such payment or satisfaction within ninety days after it is made to be entered on the margin of the page in the book where such encumbrance is recorded, and for any failure to do so he shall forfeit twenty dollars. Such entry of payment or satisfaction shall be signed by the creditor, his duly authorized agent or attorney, and when so signed and the signature thereto attested by the clerk in whose office such encumbrance is recorded, the same shall operate as a release of the encumbrance as to which such payment or satisfaction is entered."

Although for ten years formal release deeds had been impliedly abolished in favor of the marginal entry, they continued very generally in use, and the object of this last amendment was simply to recognize the sufficiency of "a proper release deed," when resorted to by anyone so disposed.

A further amendment in 1896 (Acts 1895-'6, p. 594), does not touch the point we are now considering; but by an act approved February 28, 1898 (Acts 1897-'8, p. 595), said section 2498 was amended as follows:

"When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendors' or mechanics' lien, it shall be the duty of such lien creditor, unless he shall have delivered a proper release deed, to cause such payment or satisfaction to be entered on the margin of the page in the book where such incumbrance is recorded, and for any failure to do so, after five days' notice, if the note, bond or other evidence of debt secured by such lien shall be left with the lien creditor or with the clerk in whose office such incumbrance is recorded until the lien is released, as provided by this section, he shall forfeit twenty dollars. Such entry of payment or satisfaction shall be signed by the creditor or his duly authorized agent, attorney, or attorney in fact, and the note, bond or other evidence of debt secured by such lien, duly cancelled, shall be produced before the clerk in whose office such incumbrance is recorded, and when so signed and the signature thereto attested by such clerk, with a certificate that said note, bond or other evidence of debt duly cancelled was produced before such clerk, the same shall operate as a release of the incumbrance as to which such payment or satisfaction is entered."

The next amendment is found in Acts 1899-1900, p. 81, which reads:

"When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendor's or mechanic's lien, it shall be the duty of such lien creditor, unless he shall have delivered a proper release deed, to cause such payment or satisfaction to be entered on the margin of the page in the book where such incumbrance is recorded; and for any failure to do so, after five days' notice, if the note, bond, or other evidence of debt secured by such lien shall be left with the lien creditor, or with the clerk in whose office such incumbrance is recorded, until the lien is released, as provided by this section, he shall forfeit twenty dollars. Such entry of payment or satisfaction shall be signed by the creditor or his duly authorized agent, attorney, or attorney in fact, and the note, bond, or other evidence of debt secured by such lien, duly cancelled, shall be produced before the clerk in whose office such incumbrance is recorded, or an affidavit shall be filed by the said creditor or his duly authorized agent or attorney, or attorney in fact, with such clerk, to the effect that the debt therein secured and intended to be released, or discharged has been paid to such creditor, his agent, attorney, or attorney in fact, who was, when the said debt was so satisfied, entitled and authorized to re-

ceive the same, and that such note, bond, or other evidence of debt has been cancelled and delivered to the person by whom it was paid, or has been lost or destroyed and cannot be produced as herein required; and when so signed and the signature thereto attested by such clerk, with a certificate that said note, bond, or other evidence of debt duly cancelled was produced before such clerk, or that the affidavit hereinbefore required has been duly filed with such clerk, the same shall operate as a release of the incumbrance, as to which such payment or satisfaction is entered, as fully and effectually as if the said marginal entry were a formal deed of release duly executed and recorded."

In these two last quoted amendments several important provisions are added to strengthen the statute and guard against the fraudulent use of marginal entries, such, for instance, as production and cancellation of the note, etc. The last clause of the 1899-'00 act is noteworthy in this, that where previous acts had said the marginal entry "shall operate as a release of the incumbrance as to which such payment or satisfaction is entered," it is now said that the entry "shall operate as a release of the incumbrance as fully and effectually as if the said marginal entry were a formal deed of release duly executed and recorded."

Again the act is amended at page 839 of the volume last cited, but no change whatever is made in the foregoing provisions; and the same is true of another act, approved February 16, 1901 (Acts 1901, p. 348).

In this state of the law the case of *Brooking* v. *Nolde* came before the Chancery Court of Richmond, upon the following facts, set out in the bill, which was filed in July, 1903:

Brooking & Kean, partners doing business in Goochland County, loaned Oscar E. Parrish, of Richmond, the sum of $800.00, for which said Parrish gave his five negotiable notes, each dated February 25, 1898, and made payable to the order and endorsed by said Oscar E. Parrish, one for the principal sum of $800.00 at two years after date, and four interest notes for $24.00 each, at 6, 12, 18, and 24 months after date, payable at the State Bank of Virginia. Said Parrish in order to secure the payment of said notes executed a deed of trust conveying to B. O. James, Trustee, certain property owned by said Parrish in the City of Richmond, on the north side of Clay Street, be-

tween 27th and 28th Streets, which deed of trust was duly recorded in the Clerk's office of the Richmond Chancery Court on March 4, 1898. On July 17, 1901, a marginal entry was made in the deed book where said trust deed was recorded, which reads as follows:

> "This deed of trust has been satisfied. S. H. Pulliam, beneficiary;"

to which memorandum was appended the Clerk's certificate, to the effect that the notes secured by said deed had been presented to him marked "paid." Subsequent to such marginal release the said Oscar E. Parrish sold and conveyed the land in question to Fleming L. Landrum, who in turn conveyed to Montgomery, and he to Nolde, the then owner. Plaintiffs charged that the said marginal entry was false and fraudulent; that the said S. H. Pulliam was not the beneficiary; that the said $800.00 note was not presented to the Clerk; that said note had never been marked satisfied, and was never out of possession of plaintiffs; that said S. H. Pulliam had no authority to mark said deed of trust "satisfied," or to represent the plaintiffs in any capacity; and that the entry so made was a fraud upon the rights of complainants, and constituted a cloud upon the title of said lot. Plaintiffs therefore prayed that said marginal entry be declared void, and the land subjected to payment of said $800.00 note. Nolde and others filed their answer stating that, before purchasing said land, they employed competent examiners of title to investigate and report concerning the title to said property, and that said examiners did not report that said property was subject to the alleged lien nor did the records show that such lien at that time existed, but to the contrary, said records showed that said lien had been fully discharged and satisfied; that they believed in good faith that said lien had been fully satisfied; that they had a right to rely on said marginal release in pursuance of the statute in such cases made and provided; that Samuel H. Pulliam, who represented himself to be the beneficiary under said deed of trust, and at whose instance the same was marked satisfied, was an agent of Brooking & Kean, and that the said Pulliam had a right to receive and did receive as agent for them certain payments on account of said note, and that any wrongful act of the

said Samuel H. Pulliam in having the said deed marked satisfied was chargeable to the said plaintiffs, and not to respondents.

By decree entered on March 15, 1905, the Court, *Held*:

That Samuel H. Pulliam was not and never had been the creditor or beneficiary under said deed of trust, or the holder or owner of said note, and had no authority or interest in the premises; that the marginal entry was fraudulent and void, and of no effect so far as the plaintiffs were concerned, and that said deed of trust is a valid and subsisting lien on the said real estate thereby conveyed to B. O. James, trustee.

In discussing *Evans* v. *Bank,* and *Brooking* v. *Nolde,* the editor of the VIRGINIA LAW REGISTER (Vol. II, p. 227), says:

> "In the first case the Supreme Court decided that the release though fraudulent and though made by a party who was not in fact the owner of the note, was valid, while in the latter case it concluded that the marginal entry was null and void. The Court in refusing the appeal, of course, did not hand down a written opinion, and consequently we are left to conjecture as to the distinction it intended to draw between the two cases, which seems to be this: That where a deed is fraudulently released by one who is a creditor named in the deed of trust, his release is valid, although he is not a creditor at the time he signs the release. While in cases of notes made payable to the order of the maker, the name of no creditor appearing in the deed, a fraudulent release by one falsely claiming to be the creditor will not be held to be a valid release. At any rate, it appears that it is unsafe to make use of a marginal release where the note secured does not disclose the name of the original creditor. In other words, a fraudulent release by the original creditor of record is valid and binding, notwithstanding the fact that he has ceased to be the creditor. But a fraudulent release by a stranger to the record is of no effect, and all releases by parties who are not named as creditors in the deed of trust should be accepted with caution."

The distinction here suggested by the LAW REGISTER between a deed of trust securing notes made payable to a designated person, and one securing ordinary negotiable notes, as differentiating the Evans case from the Brooking Case, does not commend itself to our judgment. When the payee named in a note endorses same in blank it becomes as much negotiable as any other

note, however made, and there would seem to be no good reason why a holder for value of such paper should not enjoy equal rights under the law. But, as we shall presently see, our legislature promptly confirmed the distinction noted, by passing an Act to that effect.

In order for a marginal release to be valid it should conform in all respects to the requirements of the statute authorizing same. Those requirements are (a), that the release entry shall be made by the lien creditor; (b), that it shall be signed by such creditor, or his duly authorized agent; (c), that the note, bond or other evidence of debt, duly cancelled, shall be produced before the clerk, or (d), that an affidavit shall be filed by the creditor or his duly authorized agent, stating that the debt has been paid to such creditor, who was entitled to receive payment of same, and that the note, bond or other evidence of debt has been lost or destroyed and cannot be produced; (e), that the memorandum shall be signed by the lien creditor or his agent; and (f), that this entry shall be attested by the Clerk, with a certificate that said note, duly cancelled, was produced, or the affidavit of its loss filed with said clerk. Only when all these prerequisites have been met does the marginal entry operate as a release.

Now, how can a person dealing with the title of property tell whether such memorandum is valid? Was it made by the lien-creditor, or by some one impersonating him? Was it done by his duly authorized agent, or by some one masquerading as such? Was the note secured by the deed exhibited to the clerk, or another note of like description? These and other questions readily suggest themselves with reference to the statute under consideration, showing how wide open is the door for fraud in such practice.

Where a release deed is used there can be no trouble except in case of collusion between the trustee and the mortgagor, or of negligence on the part of the trustee (See, *Williams* v. *Jackson,* 107 U. S. 478). But in either of these events the losing party has personal recourse against those at fault. In every aspect, then, the danger is far greater when placing reliance upon a marginal release, where an alleged beneficiary has no one to

check him up other than the clerk, whose business in that regard is altogether ministerial and perfunctory, and where the defrauded party has small chance of recouping his loss. The statute in question affords not only an opportunity, but a temptation, for fraud on the part of persons dishonestly inclined, and the wonder is that they have not availed themselves of it to a larger extent in those communities where marginal releases generally obtain.

The Court in *Williams* v. *Jackson, supra,* threw out a suggestion as to how lien-holders might protect themselves against fraudulent releases. The Court says:

> "The first deed of trust having been made to the trustees therein named for the benefit of Augustus Davis, and to secure the payment of the notes from the grantors to him; and the plaintiffs, upon the transfer and indorsement to them of those notes, having taken no precaution to obtain and put on record an assignment of his rights in such form as would be notice to all the world; the recorded deed of release, executed by him as well as by the trustees, reciting that the notes had been paid, and conveying the legal title, bound the plaintiffs, as well as himself, in favor of anyone acting upon the faith of the record and ignorant of the real state of facts.
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> "If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors, or of a declaration of trust from the trustees, or of an assignment from Augustus Davis of his equitable interest in the land as security for the payment of the notes. The record not showing that any person other than Augustus Davis had any interest in the notes, or in the land as security for their payment, an innocent subsequent purchaser or incumbrancer had the right to assume that the trustees, in executing the release, had acted in accordance with their duty."

The *Bank* v. *Evans* case was decided in November, 1897, and our Legislature shortly thereafter, adopting the suggestion made in *Williams* v. *Jackson, supra,* and referred to in the VIRGINIA LAW REGISTER, *supra,* passed an act (Acts 1897-'8, p. 258), which now appears in the Code (1919) as section 6457, for the avowed purpose as stated by the revisors, of "protecting assign-

ees, transferees, or indorsees of debts secured on real estate by mortgage, deed of trust, vendor's or mechanic's lien." Said section provides in substance that when a debt so secured is assigned, transferred or endorsed to another, in whole or in part, by the original payee thereof, such payee, assignee, transferee, or endorsee, may cause a memorandum or statement of the assignment to be entered on the margin of the page in the book where such incumbrance is recorded, with like formality as required for a marginal release; and where such transfer is so entered, the same shall operate as a notice of such assignment and transfer.

It is not said to what extent, in the absence of such memorandum, the transfer will be invalid.

Under this rule, every time such a note passes from one holder to another, there must be a new trust deed, or formal assignment in writing, solemnly acknowledged and put on record; otherwise the purchaser is liable to find that his note, which he confidently thought was secured by a real estate mortgage, has nothing back of it at all.

The statute last cited is quite impracticable, and used little, if any, in actual business dealings. As it in terms applies only to assignments by the "original payee," it would seem that where no payee is designated in the note, a transferee thereof gets good title against the world, without any marginal memorandum, and notwithstanding a fraudulent release of the lien securing same. Would this be true of a note drawn by the maker payable to himself or his own order, and by him endorsed?

Does it apply where the trust deed is given, not to secure a designated person, as in the Evans case, but only *the holder* of a note or notes drawn in a specified manner? The act in its original form (Code 1904, sec. 2498a), reads: "Whenever any debt secured on real estate by deed of trust, etc., has been assigned, transferred or endorsed to another by the original payee thereof, such payee may cause," etc. The revisors, in said section 6457 of the new Code, changed this so as to make it read: "Whenever any debt secured on real estate by deed of trust, etc., has been assigned, transferred or endorsed to another by the original payee thereof, such payee, assignee, transferee, or en-

dorsee, may cause," etc. Thus, it appears that, even as the statute now stands, no marginal memorandum of assignment is contemplated except where the deed secures a named individual as payee. That was the Evans case, with direct reference to which this provision was enacted, and it extends no further. That act was in force when the Nolde case arose, and our Court of Appeals held that the marginal release was void as to the plaintiffs, Brooking & Kean, though the notes held by them were drawn by Oscar E. Parrish and made payable to Oscar E. Parrish, who had endorsed and assigned them to said plaintiffs, without making any marginal note of such assignment. Hence, this statute, adopted "for the protection of assignees, transferees, and endorsees" of negotiable securities, is very limited in its application.

How far was this statute intended to alter the previous law?

In *Nat. Valley Bank* v. *Harman,* 75 Va. 604, our Court of Appeals, by Judge Staples, said:

> "The learned counsel for the appellant has very properly said, that in case of a mortgage upon real estate, an assignment of the debt is an assignment of the mortgage, without any formal assignment, transfer, or even mention of the mortgage itself.
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> "The mortgage is a mere security for the debt, and cannot exist without it. And where the mortgage is given to secure a negotiable note, it has been held in a number of cases that the *bona fide* holder of the note takes the mortgage as he takes the note, unaffected by any equities between the mortgagor and mortgagee subsequent to the transfer of the note."

Although the learned Judge here speaks only of equities between the mortgagor and mortgagee, his reasoning, which treats the security as an inseparable incident of the note, makes the principle apply equally to equities in favor of anyone, even an innocent third party, created "subsequent to the transfer of the note."

If said section 6457 was designed to abrogate this rule, the intention has not been expressed with that clearness which one would expect where a question of title to mortgage paper is involved. On the contrary, it seems quite evident that, as to

the most common form of securities, at least, there was no intention to make a change.

The question has been raised by some members of the profession as to whether a mere marginal release can be effective to revest in the grantor the legal title which by his deed was conveyed to the trustee; it being suggested that such memorandum, though operating as a sufficient transfer of the equitable estate, does not affect the legal title. The point does not seem to be well taken.

> "Trust deeds are so essentially mortgages, that they may be discharged by an entry of satisfaction upon the margin of the record, where the statute provides for such method of satisfying mortgages. A reconveyance by the trustees is not necessary." 26 A. & E. Enc. (old) 984.

But our single purpose was to utter a caveat in the matter of marginal releases, which are getting to be more prevalent as our examiners pass them without objection. We insist that they are extremely dangerous, and that an examiner ought to report in his abstract every trust deed so released. A purchaser of the property, or lender of money on same, would then be put upon notice of the extra hazard and given a chance to protect himself by making whatever enquiry he might deem proper in the premises. Such informal method of canceling a lien may do very well in a sparsely settled community, where the clerk has personal acquaintance with practically everybody doing business in his office; but not so in populous centers, where comparatively few people know one another, and unscrupulous schemers can impose upon a confiding public with little or no risk of detection before the fraud is accomplished.

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